since the declarant is dead. Also there is a guaranty of trustworthiness, because the return is made under oath, and the penalty for dishonesty is so heavy that the gain is hardly worth the chance. Thus, since it appears that the return is against interest, and since it fulfills the requirements of necessity and trustworthiness, it would seem that the return should not have been excluded as incompetent.

Another question involved here, however, is one of relevancy. Damages are assessed in part according to the pecuniary loss to an estate by reason of injury or death, and this loss is determined by ascertaining the earning capacity of the injured or deceased party.[5] If the income of a party falls solely under the classification of salaries, wages, fees, and commissions, then the return clearly shows the earning capacity and is relevant.[6] Where, however, part of the income is derived from investments, then only that part of the return relating to earning capacity is relevant, and only that part should go to the jury. When the income is classified under the head "earnings," and is derived from running a store, as in the instant case, the income from investments is not separated from income from personal services. The return then furnishes the jury with no information from which to determine earning capacity unless the amount of the investment is ascertained and the profit derived from this is subtracted from the total income. In the instant case it seems that the court should have excluded the evidence, but not for the reason given.

OVERLOOKING STATUTES

In an appeal recently argued before the House of Lords, a statute which might have had a considerable bearing upon the case was entirely overlooked in the lower court. Nor was it discovered until the appellate court came across it in considering the decision. Notice was given that a further argument of the appeal was desired and the Lord Chancellor, in addressing counsel, said:

"It is not possible in the ordinary course for their Lordships to be aware of all the authorities, statutory and otherwise, which might be relevant to the issues in the particular case. Their Lordships are in the hands of counsel and those that instruct counsel, and it is the practice of the House to expect, and even to insist, that authorities that bear one way or another upon matters in debate, shall be brought by counsel to their attention."
Glebe Sugar Refining Co. v. Trustees of Greenock [1921] W. N. 861.

This incident raises the interesting question as to what should be the procedure when a statute, material to the issue, or controlling it, is

[5] See *Patterson v. Williams* (1920, Tex. Civ. App.) 225 S. W. 89; L. R. A. 1918 E, 280, note.
[6] See Montgomery, *Excess Profits Tax Procedure* (1921) 514.

entirely overlooked. Professional ethics require that counsel make a thorough and diligent search for all the authorities in point. The fact that there are few cases in the books where statutes have been completely overlooked is a tribute to the diligence that is usually exercised. But even an attorney is not infallible and the presumption that he knows all the law is an unfair one. A thorough knowledge of the law is the working tool of every able lawyer. Likewise, it is the chief qualification of the judge on the bench. The court is bound to take judicial notice of the laws of its jurisdiction,[1] and, even though these laws are not specially pleaded or are not mentioned in the course of trial, yet the court, using them as a part of its legal equipment, may nevertheless give them consideration in determining the case.

There is a general rule, not consistently followed, that points not raised in the trial court cannot be urged on appeal. Thus a failure to offer the statute of frauds as a defense in the lower court makes it impossible to use it on appeal.[2] The same rule has been applied to the statute of limitations.[3] In both of these classes of cases the statute offered a good defence, but one of such a nature that the parties could waive it without doing an injustice. It has been held that a claim of unconstitutionality must be made in the trial court.[4] The issue of public policy may, however, be raised for the first time on appeal,[5] and this must necessarily be so, for the appellate court is presumably the determining agency of the law of the state. In cases recently arising in Massachusetts and Alabama where statutes required motor vehicles and operators to be licensed and the courts had held that the failure to be so licensed made the parties trespassers unlawfully upon the road, the appellate court refused to consider these statutes for the first time on appeal.[6] Here the statutes were positive in their nature, concerned the substantive rights of the parties, and were the law of the jurisdiction. The purpose of pleadings is to define the issues, and, had the appellate courts considered these statutes on appeal, the cases would have been decided upon an entirely different theory upon which no evidence had

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[1] 4 Wigmore, *Evidence* (1905) secs. 2572, 2573.

[2] *Goldman v. Cohen* (1915) 167 App. Div. 666, 153 N. Y. Supp. 41; *Armstrong v. Barceloux* (1917) 34 Calif. App. 433, 167 Pac. 895; *Kendall v. Metroz* (1918) 65 Colo. 387, 176 Pac. 473; *Bennett v. Denton* (1917) 194 Mich. 610, 101 N. W. 831; *U. S. Rubber Co. v. Silverstein* (1920) 229 N. Y. 168, 128 N. E. 123.

[3] *Cubit v. Jackson* (1917, Tex.) 194 S. W. 594; *Vazio v. Zimmer* (1919, Mo.) 209 S. W. 909. *Dworkin v. Caledonian Ins. Co.* (1917, Mo.) 191 S. W. 1092.

[4] *State, ex rel. Jones, v. Howe Scale Co.* (1913) 253 Mo. 63, 161 S. W. 789.

[5] *Ellis v. Frawley* (1917) 165 Wis. 381, 161 N. W. 364; *Daucet v. Mass. Bonding & Ins. Co.* (1917) 180 App. Div. 599, 167 N. Y. Supp. 892. But see *Boston Piano Co. v. Pontiac Clothing Co.* (1917) 199 Mich. 141, 165 N. W. 856. In this case the contract in question was like those already considered and held illegal in two cases previously decided in the same court. Yet the illegality, not having been urged in this case in the trial court, could not be considered on appeal.

[6] *Littlefield v. Gilman* (1911) 207 Mass. 539, 93 N. E. 809; *Atlantic Coast Line v. Kelly* (1918) 16 Ala. App. 360, 77 So. 972.

been received under the pleadings in the lower court. It has been held that a state court is not bound to take judicial notice of a ruling of the Interstate Commerce Commission, and that the failure to plead such a ruling in the trial court precluded its consideration on appeal.[7] There has been a suggestion in some of the cases that the Federal Employers' Liability Act cannot be urged for the first time in the appellate court, but these cases apparently turn on the point that sufficient facts were not pleaded below to bring the case within the statute.[8]

The question of overlooking statutes has been given sensible and consistent treatment in Connecticut. In *Cunningham v. Cunningham*[9] a statute giving a deserted wife a right of action to secure an order for support was entirely overlooked by the trial court, as was a statute governing a rule of procedure in *Salewski v. The Waterbury Manufacturing Co.*[10]. But in both cases the appellate court considered the statutes. In the case of *Schmidt v. Manchester*[11] the question was as to the sufficiency of a notice of defect in a highway and the trial court entirely overlooked a statute, which, upon appeal, was held to be determinative of the case. In all of these cases the substantive rights of the parties would have been materially affected had the statutes not been considered. But the point, in each case, was raised below, although no mention was made of the statutory authority, so that the appellee was not deprived of any defence that he did not have in the trial court.

The trial of a cause is not a game but a search for truth and justice, and it is submitted that an appellate court should consider any statutory authority material to the issue, whether or not it was raised in the trial court. The failure to mention a statute may well be held to operate as a waiver in those cases where the interests of the public are not directly involved and where an express waiver would be held operative. In general, statutes are "the law of the land" which courts are bound to apply. Errors arising from ignorance of a statute should be corrected on appeal and a new trial granted if necessary in order to secure a proper presentation of the facts in the light of the statute.[12]

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[7] *Banaka v. Mo. Pac. Ry.* (1910) 193 Mo. App. 345, 186 S. W. 7; *Keeney v. Chic., B., & Q. Ry.* (1918) 183 Iowa, 522, 167 N. W. 475.

[8] *Rogers v. N. Y. C. & H. R. Ry.* (1916) 171 App. Div. 385, 157 N. Y. Supp. 83; *Ford v. Dickinson* (1919, Mo.) 217 S. W. 294. The better rule seems to be that the state courts are bound to take judicial notice of the Federal Employers' Liability Act, and that it need not be pleaded, but that it is merely necessary to state sufficient facts to bring the case within the act. 47 L. R. A. (N. S.) 75, note; L. R. A. 1915 C, 78, note.

[9] (1899) 72 Conn. 157, 44 Atl. 41.

[10] (1914) 89 Conn. 46, 92 Atl. 682.

[11] (1918) 92 Conn. 551, 103 Atl. 654.

[12] *Fourth Nat. Bank v. Franklyn* (1886) 120 U. S. 747, 751, 7 Sup. Ct. 757, 759; see *Hart v. Adair* (1917, C. C. A. 9th) 244 Fed. 897.

When a court *sua sponte* dismisses a case on a doubt as to its jurisdiction, there ought to be plausible ground justifying the doubt. The Circuit Court of Appeals of the Third Circuit in the case of *Garvan v. Kogler,* March Term, 1921, No. 2863, has recently dismissed a complaint for debt, brought under section 9 of the Trading with the Enemy Act, of a resident of the United States against the Alien Property Custodian, appearing on behalf of a German non-resident debtor, on the ground that it did not appear clearly to the court that the plaintiff was not an "enemy or ally of enemy." Between the parties there was no such issue, and it was not apparently raised at the trial. This was doubtless due to the fact that section 2 of the Trading with the Enemy Act (40 Stat. at L. 411, 419) expressly excludes residents of the United States (except internees under Presidential proclamation) from the category of "enemy." The court seems to have confused citizenship with domicil, the test of enemy character under the Trading with the Enemy Act, and to have been unfamiliar with section 2, which seems to settle any doubt it might have had. When an appellate court adopts the unusual practice of dismissing a complaint *sua sponte* for want of jurisdiction it should have some slight legal justification.